

1  
2  
3  
4  
5  
6  
7  
8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
10

11 YOUNG HWAN KIM,

12 Petitioner,

13 vs.

14 UNITED STATES OF AMERICA,

15 Respondent.

CASE NO. 07cr0152 JM  
CIVIL NO. 07cv2207 JM

**ORDER DENYING MOTION TO  
VACATE AND CORRECT  
SENTENCE PURSUANT TO 28  
U.S.C. § 2255**

16 Petitioner, proceeding in propria persona, moves to vacate and correct his sentence pursuant  
17 to 28 U.S.C. § 2255. Petitioner argues that he was entitled to a downward sentencing departure under  
18 18 U.S.C. § 3553(b) and a post conviction downward departure for rehabilitation. He further argues  
19 that he received ineffective assistance of counsel at sentencing because he should have received a  
20 downward departure for his status as a deportable alien. The government opposes the motion. For  
21 the reasons set forth below, the court hereby **DENIES** the motion.

22 **I. BACKGROUND**

23 On April 5, 2007, pursuant to a written plea agreement, Petitioner pleaded guilty to one  
24 misdemeanor and two felony counts of illegal entry in violation of 8 U.S.C. § 1325. (Resp., Ex. A  
25 (“Plea Agreement”) at 2.) In exchange, the government agreed to dismiss the indictment charging  
26 Petitioner under 8 U.S.C. § 1326. (Id.) Additionally, the plea agreement provided that the parties  
27 would jointly recommend a base offense level of 8, a sixteen-point upward departure for a previous  
28

1 deportation and conviction of a violent crime,<sup>1</sup> and a three-level downward departure for acceptance  
 2 of responsibility, amounting to a total offense level of 21. (Id. at 7.) The parties agreed that  
 3 Petitioner's criminal history was a category IV, resulting in a guideline range of 57 to 71 months. (Id.  
 4 at 8; Resp., Ex. C ("Judgment and Sentencing Hearing") at 8.) The parties would further jointly  
 5 recommend a sentence of 48 months in prison. (Id.) The plea agreement also provided,

6  
 7 In exchange for the Government's concessions in this plea agreement, defendant waives, to  
 8 the full extent of the law, any right to appeal or to collaterally attack the conviction and  
 9 sentence, including any restitution order, unless the court imposes a custodial sentence greater  
 10 than the high end of the guideline range (or statutory mandatory minimum term, if applicable)  
 11 recommended by the Government pursuant to this plea agreement at the time of sentencing.

12 (Plea Agreement at 9, ¶ XI.)

13 During the April 19, 2007 plea colloquy before Magistrate Judge Jan M. Adler, Petitioner  
 14 indicated that he understood he was giving up his right to appeal and collateral attack and that he  
 15 otherwise understood the plea agreement in its entirety. (Resp., Ex. B ("Plea Colloquy") at 20.)  
 16 Magistrate Judge Adler found that Petitioner was competent to enter the plea and that he gave a  
 17 "knowing and intelligent waiver of each [of his] rights . . . ." (Id. at 23: 13–17.) On May 25, 2007,  
 18 this court accepted Petitioner's guilty plea and sentenced Petitioner to 48 months in prison, followed  
 19 by a one-year term of supervised release. (Judgment and Sentencing Hearing at 9.) Petitioner stated  
 20 that he understood that he waived his "right to appeal or in any other way attack or challenge either  
 21 the convictions . . . or the sentence imposed . . . ." (Id. at 10: 17–21.)

22 On November 19, 2007, Petitioner filed a motion to vacate and correct his sentence under 28  
 23 U.S.C. § 2255. Petitioner claims the following: (1) he was entitled to a downward sentence departure  
 24 under 18 U.S.C. § 3553(b) due to post conviction rehabilitation; and (2) he received ineffective  
 25 assistance of counsel because counsel failed to obtain a two-point downward departure for his status  
 26 as a deportable alien. (§ 2255 Mot. at 2–4.)

27 Respondent opposes the § 2255 motion on the following grounds: (1) Petitioner voluntarily  
 28 and knowingly waived his right to appeal or collateral attack his sentence and conviction; and (2) even

---

<sup>1</sup>On August 12, 1996, Petitioner was convicted of First Degree Burglary in violation of California Penal Code § 460(a), an aggravated felony, in Orange County, California. (Plea Agreement at 3.)

1 if Petitioner did not waive his right to appeal or collaterally attack, Petitioner's ineffective assistance  
2 of counsel argument fails on the merits. (Oppo. at p.1.)

## 3 **II. DISCUSSION**

### 4 **A. Petitioner Waived His Right to Collateral Attack**

#### 5 **1. Legal Standards**

6 Section 2255 provides, in relevant part,

7 A prisoner in custody under sentence of a court established by Act of Congress claiming the  
8 right to be released upon the ground that the sentence was imposed in violation of the  
9 Constitution or laws of the United States, or that the court was without jurisdiction to impose  
10 such sentence, or that the sentence was in excess of the maximum authorized by law, or is  
11 otherwise subject to collateral attack, may move the court which imposed the sentence to  
12 vacate, set aside or correct the sentence.

13 28 U.S.C. § 2255(a).

14 The Ninth Circuit regularly enforces knowing and voluntary waivers of appellate rights in  
15 criminal cases where the waivers are part of negotiated guilty pleas and do not violate public policy.  
16 United States v. Anglin, 215 F.3d 1064, 1066 (9th Cir. 2000). "The sole test of a waiver's validity  
17 is whether it was made knowingly and voluntarily." Id. at 1068 (citing United States v. Michlin, 34  
18 F.3d 896, 898 (9th Cir. 1994)). If a waiver of appellate rights was made knowingly and voluntarily,  
19 inquiry into the waiver's validity must end. United States v. Nguyen, 235 F.3d 1179, 1182 (9th Cir.  
20 2000). A valid waiver bars a defendant from challenging his conviction and sentence. Id. The Ninth  
21 Circuit, however, has indicated that exceptions to this rule may exist in limited circumstances,  
22 including where a § 2255 petition challenges a plea agreement's validity by way of an ineffective  
23 assistance of counsel or involuntariness claim. Washington v. Lampert, 422 F.3d 864, 870–71 (9th  
24 Cir. 2005).

#### 25 **2. Analysis**

26 Respondent argues that Petitioner cannot collaterally attack his sentence because he knowingly  
27 and voluntarily waived his right to appeal and collateral attack in his plea agreement. (Oppo. at p.3.)  
28 Petitioner initialed each page of the plea agreement and stated during the plea colloquy that he had  
an opportunity to go over each paragraph in a language that he understood. (Plea Colloquy at 11:  
16–19.) Furthermore, Petitioner stated that he was satisfied with the advice he received from his  
attorney and that he had no questions about the plea agreement. (Id. at 12.) Petitioner's § 2255

1 motion does not address whether he made his waiver knowingly and voluntarily.

2 The plea agreement's language clearly embraces a waiver of any collateral attack on  
3 Petitioner's sentence, including a § 2255 motion. See United States v. Schuman, 127 F.3d 815, 817  
4 (9th Cir. 1997) (per curiam) (finding that defendant waived his right to appeal an incorrect application  
5 of Sentencing Guidelines even though the plea agreement did not specifically mention this right; to  
6 find otherwise "would render the waiver meaningless"). Furthermore, Petitioner does not challenge  
7 the voluntariness of his waiver or otherwise inform the court of any other reason to invalidate his  
8 waiver. The record reflects that Petitioner's waiver was knowing and voluntary. Accordingly, the  
9 court concludes that Petitioner validly waived his right to collaterally attack his sentence. Nguyen,  
10 235 F.3d at 1182.

## 11 **B. Petitioner Fails to Demonstrate Ineffective Assistance of Counsel**

### 12 **1. Legal Standards**

13 Even if Petitioner did not validly waive his right to collaterally attack his sentence, his  
14 ineffective assistance of counsel claim fails on the merits. To prevail on an ineffective assistance of  
15 counsel claim, a petitioner must demonstrate that (1) counsel's performance was deficient; and (2)  
16 counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687  
17 (1984). To establish prejudice, a petitioner must demonstrate that counsel's representation fell below  
18 an "objective standard of reasonableness" and that, but for counsel's errors, there is a reasonable  
19 probability that the result of the proceeding would have been different. Id. at 694. A defendant who  
20 pleaded guilty must demonstrate that, but for counsel's errors, he would not have pleaded guilty and  
21 instead, would have insisted on going to trial. United States v. Hill, 474 U.S. 52, 59 (1985). There  
22 is, however, a "strong presumption that counsel's conduct falls within the wide range of acceptable  
23 professional assistance." Strickland, 466 U.S. at 689.

### 24 **2. Analysis**

25 Petitioner appears to argue that he received ineffective assistance of counsel because his  
26 counsel failed to argue for sentencing departures. Citing United States v. Rhodes, 145 F.3d 1375  
27 (D.C. Cir. 1998), Petitioner states that he had "maintained a clear conduct" and has been "making  
28 efforts at rehabilitating himself" and, therefore, is entitled to a post conviction downward sentence

1 departure under U.S. Sentencing Guidelines § 5K2.19. (§ 2255 Mot. at 3: 15–18.) Rhodes, however,  
 2 only applies when a court is resentencing a defendant following an appeal. Id. at 1379 (holding that  
 3 courts may consider post conviction rehabilitation at resentencing). Rhodes, therefore, is inapplicable  
 4 here.

5 Petitioner further claims that counsel “misrepresented and misadvised the plea . . . [and] the  
 6 condition of his plea bargain . . . in as much counsel knew that defendant’s whole behavior and guilty  
 7 plea was structured to avoid a plea agreement that would not result in a long sentence.” (§ 2255 Mot.  
 8 at 5: 15–20.) There is, however, no evidence that counsel misrepresented the plea agreement to  
 9 Petitioner. Counsel secured a 48-month sentence even though Petitioner’s exposure was higher.<sup>2</sup>  
 10 Furthermore, Petitioner consistently represented that he was satisfied with counsel’s performance.  
 11 In the plea agreement, Petitioner agreed that he “consulted with counsel and is satisfied with counsel’s  
 12 representation.” (Plea Agreement at 10: 16.) Additionally, at the plea colloquy, Petitioner stated that  
 13 he was satisfied with his counsel’s advice. (Plea Colloquy at 12: 5–8.) Petitioner’s declarations  
 14 concerning counsel’s performance “were made in open court under oath and thus carry a strong  
 15 presumption of verity.” United States v. Grewal, 825 F.2d 220, 223 (9th Cir. 1987) (citing United  
 16 States v. Rivera-Ramirez, 715 F.2d 453, 458 (9th Cir. 1983)). Petitioner, therefore, fails to present  
 17 a claim of deficient performance rising to the level required by Strickland.

18 Petitioner also requests that the court grant him a two-point downward departure for his status  
 19 as a deportable alien. (§ 2255 Mot. at 4: 10–12.) The court sentenced Petitioner to 48 months in  
 20 prison, which was well below his advisory guideline range of 57 to 71 months. (Judgment and  
 21 Sentencing Hearing at 8.) The plea agreement reduced Petitioner’s sentence to 48 months despite his  
 22 criminal history, which includes a first degree burglary in violation of California Penal Code § 460(a).  
 23 (Plea Agreement at 3.) Petitioner’s 48-month sentence was the result of upward and downward  
 24 departures provided for in the plea agreement. Petitioner received the exact sentence that he  
 25 negotiated for in the plea agreement. Furthermore, Petitioner has not demonstrated that, but for  
 26 counsel’s advice, he would not have pleaded guilty and would have instead insisted on going to trial.  
 27 Hill, 474 U.S. at 59. As in Freeny, it is “improbable that [petitioner] would have chosen to go to trial


28  
<sup>2</sup>Petitioner faced a potential sentence of 57 to 61 months in prison. (See Plea Colloquy at 15.)

1 or, if convicted, would have received a sentence less than” the sentence he actually received. United  
2 States v. Freeny, 841 F.2d 1000, 1002 (9th Cir. 1988). The court, therefore, concludes that Petitioner  
3 fails to identify any prejudice within the meaning of Strickland.

4 In sum, the court hereby **DENIES** Petitioner’s motion to vacate or correct his sentence  
5 pursuant to 28 U.S.C. § 2255.

6 **IT IS SO ORDERED.**

7 DATED: October 27, 2008

8   
9 Hon. Jeffrey T. Miller  
United States District Judge

10 cc: all parties  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28